No. 98-1701
No. 98-1706

In the Supreme Court

OF THE

United States

OCTOBER TERM 1998

UNITED STATES OF AMERICA,
Petitioner,
vs.
GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE PACIFIC MERCHANT SHIPPING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI OF THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO) AND THE UNITED STATES OF AMERICA

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I. SUMMARY OF ARGUMENT[1]

The decision of the United States Court of Appeals for the Ninth Circuit in this case, holding that statutes and regulations of the State of Washington relating to vessel manning and operation are not preempted by federal law, is squarely in conflict with this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). While the federal, state and local governments share control over some matters relating to pollution control and enforcement, as well as to vessel navigation in local waters, the federal government has exclusive control over matters relating to vessel design, construction, operation, equipping, personnel qualification, manning and general navigation. State and local governments are not free to conclude that a vessel approved by the federal government to navigate in waters of the United States must meet higher standards to navigate in those waters that are located within state boundaries.

II. INTEREST OF *AMICUS CURIAE*

The Pacific Merchant Shipping Association ("PMSA") is a trade association that represents foreign and domestic shipowners and operators as well as their agents and other maritime entities on the West Coast of the United States. Its predecessor organization was established in 1919. PMSA's members own, operate, manage or represent tankers, dry bulk vessels, vehicle carriers, ferry and passenger vessels, tugs and barges, container ships and general cargo vessels, which represents 75% to 80% of the total vessel tonnage calling at San Francisco Bay ports and Los Angeles area ports; a substantial portion of that tonnage also transits Washington waters in route to or from California ports.

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[1] This brief was authored in whole by counsel for *Amicus Curiae*, and no party other than *Amicus Curiae* made a monetary contribution to its preparation or submission.

By an overwhelming margin, most of the exports from and imports into the United States move by water. In significant part, those goods are moved to and from ports located on the West Coast. In 1998, more than 2,900 ships arrived at and departed from San Francisco Bay ports. Of these, 660 were tanker vessels. In the same year, more than 3,100 ships called at Los Angeles area ports. Of these, more than 700 were tanker vessels. Approximately 1,830 ships, at least 290 of which were tanker vessels, called at ports in Puget Sound in the State of Washington, and approximately 1,879 ships, at least 138 of which were tanker vessels, called at Portland, Oregon. More frequently than not, ships that call at ports on the West Coast of the United States actually call at more than one port during the voyage. Often these ports are in different states, as is the case with a significant number of liner trade vessels that call at multiple West Coast states on the same voyage.

The membership of PMSA represents a substantial portion of the world's merchant shipping tonnage that makes calls at ports on the West Coast of the United States. Approximately 8 of its 35 members own or operate tankers. PMSA submits this *amicus curiae* brief with written consent of all parties, which accompany this brief. SUP. CT. R. 37(2)(a).

III. REASONS FOR GRANTING THE WRIT

In this case the United States Court of Appeals for the Ninth Circuit held that Washington State statutes and regulations relating to the operation of oil tankers in state waters are not preempted by federal law under the Supremacy Clause of the United States Constitution and do not otherwise violate the Constitution. In so holding, the court decided an important question of federal law in a way that conflicts with decisions of this Court.

Following the oil spill involving the *Exxon Valdez* in Alaskan waters in 1989, Congress passed the Oil Pollution Act of 1990 ("OPA 90"). The legislation was ultimately a combination of several bills into one comprehensive act with nine titles. Title I of the Act, which addresses liability and compensation for oil spills, contains two provisions relating to the subject of federal preemption of state law. One provides that "[n]othing in this Act . . . shall . . . affect, or be construed or interpreted as preempting, the authority of any State . . . from imposing any additional liability or requirements with respect to . . . the discharge of oil or other pollution by oil within such State . . ." § 1018(a) of OPA 90, codified at 33 U.S.C. § 2718(a). The other provides that "[n]othing in this Act . . . shall in any way affect, or be construed to affect, the authority of . . . any State . . . to impose additional liability or additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil." § 1018(c) of OPA 90, codified as 33 U.S.C. § 2718(c).

At the time when Congress passed OPA 90, legislation already existed relating to liability and compensation for oil spills. Existing law included the Ports and Waterways Safety Act of 1972 ("PWSA"), codified as amended at 46 U.S.C. § 3701, *et seq.*, and the Port and Tanker Safety Act of 1978 ("PTSA"), codified at 33 U.S.C. § 1221, *et seq.*

The State of Washington also enacted legislation relating to oil tankers and other vessels following the *Exxon Valdez* incident. The State established an Office of Marine Safety, which was empowered to promulgate regulations to protect state waters from oil pollution. The state regulations obligate owners and operators to: 1) report events such as collisions, allisions and near misses of tankers; 2) employ specific watch and lookout practices and manning; 3) record positions every fifteen minutes, prepare comprehensive voyage plans and make frequent compass readings; 4) adhere to

specified engineering and monitoring practices; 5) test and inspect engineering, navigation and propulsion systems before entering or getting underway in state waters; 6) post written crew assignments and procedures relating to shipboard emergencies; 7) retain certain plotting records and the voyage plan in an event in state waters such as a collision, allision or near miss; 8) establish a comprehensive training program for personnel; 9) test and report regarding alcohol and drug use; 10) monitor personnel for fitness for duty; 11) limit hours personnel are allowed to work; 12) require proficiency of officers in English and other languages; 13) maintain training records for crew members of vessels; 14) implement management practices that demonstrate active monitoring of vessel operations and related matters; 15) equip vessels with global positioning, radar systems and emergency towing systems; and 16) provide notification of proposed entry of a vessel into state waters and of hazardous conditions. These regulations apply not only to vessels calling at Washington ports but also to vessels transiting Washington waters enroute to and from Canada or elsewhere. This same subject matter relating to vessel operation and management is regulated by the Coast Guard as authorized by federal statutes. *See* Appendix K to Intertanko's Petition for Writ of Certiorari, No. 98-1706, pages 349a to 353a.

As explained by the United States at pages 17-20 in its Petition for a Writ of Certiorari in *United States of America v. Locke*, No. 98-1701, many of the Washington regulations that were upheld by the Ninth Circuit in this case are inconsistent with federal law, regulations and standards. The inconsistencies include, among others, the requirements relating to the number of licensed deck officers, drug and alcohol testing and reporting, crew training policies and language proficiency of licensed deck officers.

The Ninth Circuit concluded that the Oil Pollution Act of 1990 ("OPA 90"), 33 U.S.C. § 2701 *et seq.*, "reflects the

'full purposes and objectives of Congress'. . ." better than preexisting legislation on the subject of oil pollution. *The International Association of Independent Tanker Owners (Intertanko) v. Locke*, 148 F.3d 1053, 1062 (9th Cir. 1998). The court held that the Washington regulations are not preempted by federal law because of the two provisions in Title I of OPA 90. The court found that these provisions confirm the absence of Congressional intent in OPA 90 to preempt the authority of any state to impose additional liability or requirements with respect to the pollution of the environment or the substantial threat of pollution by oil. *Id.*

The Ninth Circuit's holding conflicts with the decision of this Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). There, this Court considered whether federal law preempted then-existing Washington State regulations applicable to tankers. The Court considered the Washington regulations primarily against the Ports and Waterways Safety Act of 1972 ("PWSA"). PWSA contains two titles that overlap somewhat and are designed both to ensure vessel safety and to protect navigable waters, resources and shore areas from tanker cargo spillage. The focus of Title I is traffic control at local ports. *See Intertanko*, 148 F.3d at 1061. The focus of Title II is tanker design, construction and operation. *Id.*

The *Ray* Court noted that Title II declares that the protection of life, property, and the marine environment from harm requires the promulgation of "comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation." 435 U.S. at 161. The Court also noted that the Act directs the Secretary of the Department of Transportation (the Department that includes the Coast Guard) to establish such rules and regulations as necessary with respect to the design, construction, and operation of vessels as well as to a variety of related matters. *Id.*

The Court concluded that, insofar as the design characteristics that were at issue there are concerned, Congress has entrusted the Secretary of Transportation and the Coast Guard with the duty of determining which oil tankers are sufficiently safe to be allowed to transit the navigable waters of the United States. The Court also concluded that Congress intended "uniform national standards that would foreclose the imposition of different or more stringent state requirements." 435 U.S. at 163.

The Court reached a different conclusion as to Title I of the PWSA. The Court noted that the Secretary of Transportation had neither promulgated regulations relating to vessel traffic control issues nor determined that such regulations were unnecessary. As a result, the Court upheld the Washington State regulations that related to the subject of vessel traffic control in local waters as opposed to vessel design. The Court noted, however, that the Secretary may indeed issue regulations that would preempt the authority of the states even in the area of traffic control, but until that occurs, state regulations need not give way under the Supremacy Clause. 435 U.S. at 172.

The import of the decision in *Ray* is that to determine whether a state statute or regulation conflicts with federal law, a federal court must examine each provision of the state statute or regulation as well as any applicable federal provision. Prior to OPA 90, the federal, state and local governments shared control over some matters relating to pollution control as well as to liability and compensation. They also shared control over the navigation of vessels when knowledge of local waters was important. The federal government, however, had exclusive control over matters relating to vessel design, construction, alteration, repair, maintenance, operation, personnel qualification, equipping, manning and general navigation. 46 U.S.C. § 3703.

In enacting OPA 90, Congress did not explicitly repeal the authority that had been conferred upon the Secretary of Transportation and the Coast Guard under the PWSA and other federal statutes. That is significant for, having once given a federal agency the authority to promulgate regulations in a field, Congress must abide by that delegation of authority until it is altered or revoked. *Cf. Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 955 (1983). The House Conference Committee confirmed in its analysis of the pending legislation that was to become OPA 90 that § 1018 "does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company,* 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess., at 121-22 (1990). Accordingly, nothing in OPA 90 can be construed to demonstrate that Congress intended to repeal Coast Guard regulations that were in effect at the time Congress passed OPA 90, or to prevent the Coast Guard from adopting post OPA regulations that preempt state law.

In empowering a federal agency to act, Congress need not specifically authorize the agency to pass regulations that preempt state law for that agency to have the power to do so. *See City of New York v. Federal Communications Commission,* 486 U.S. 57, 64 (1988). The Coast Guard regulations that were promulgated pursuant to Congressional direction in PWSA were, for the most part, intended to preempt state regulation relating to the operation of vessels. *See* Appendix H to Intertanko's Petition for a Writ of Certiorari, No. 98-1706, at pages 269a-289a and Appendix K at pages 349a-353a.

The Ninth Circuit's decision in this case is inconsistent with the conclusion of the *Ray* Court that the federal judgment of whether a vessel is safe to navigate in waters of the United States prevails over a contrary state judgment. *See* 435 U.S. at 165. The issue is one of extreme importance

to the members represented by PMSA. Under the Ninth Circuit's ruling, other coastal states of the circuit, notably California, Oregon, Hawaii and Alaska, are free to adopt their own, different requirements relating to any aspect of OPA 90. Moreover, in addition to regulating tanker vessels, the State of Washington is now empowered to enforce its regulations that relate to the screening of dry cargo and passenger vessels that transit its waters to determine whether they present a substantial risk of harm to public health and safety of the environment. *See* Wash. Rev. Code § 88.46.050.

Examples of conflicts between Washington regulations and federal law relating to vessel operation and management are set forth in the United States Petition for Writ of Certiorari, No. 98-1701, at pages 17 to 20. The conflicts will require vessel operators otherwise complying with Coast Guard standards and International Agreements to incur additional extraordinary expense and time to comply with the more stringent Washington standards by, for example:

> (i) transporting to their vessels additional multilingual officers and crews trained to Washington standards for manning, navigation, engineering and watch standing for transit of their vessels through Washington waters, or maintain such vessel staffing at all times during voyages throughout the world which include Washington waters;
>
> (ii) constantly preparing and maintaining the Washington required records and submitting the reports when required as critiqued at pages 3 and 4, *supra,* which are different in format and content from the Coast Guard requirements, thus imposing duplicate record keeping burdens on operators. These requirements, in large part, apply to the operation of the concerned vessels throughout the world, and not just while in Washington waters; and

(iii) performing random alcohol and drug testing of all crew members on all vessels operated by concerned carriers throughout the world, not just those transiting Washington waters, and reporting the test results to Washington, a rule far more burdensome than the Coast Guard standards and which may violate the laws of numerous flag states of the vessels calling in Washington waters.

These extraordinary requirements and expenses would certainly be compounded should other states such as Oregon, California, Hawaii, and Alaska enact their own detailed regulations on the same subject matter as covered by the Washington regulations. Operators of vessels transiting the waters of multiple West Coast states could be burdened with the exceptional expenses and an extraordinarily difficult management impediment in dealing with multiple record keeping and reporting in different formats, and drug testing, training and transporting officers and crews to comply with multiple and diverse state and federal standards.

Indeed, the expertise of the Secretary of Transportation and the Coast Guard to prescribe national and uniform regulations for the concerned subject matter as directed by 46 U.S.C. § 3703(a), which includes consultation and consideration of views of other interested agencies, authorities and parties described in 46 U.S.C. § 3703(c) and 33 U.S.C. § 1231, will be totally frustrated and wasted. This prevents a national and uniform set of maintenance, operation, equipping, personnel qualifications, and manning standards compatible with international agreements upon which the international maritime community can rely. Moreover, the Ninth Circuit's ruling leaves open the door for a multi-state regulatory mishmash affecting not only tank vessels, but dry cargo and passenger vessels as well, all of which are within the ambit of the concerned Washington statutes. The PMSA members, who are particularly at risk because of

their operations in the states comprising the Ninth Circuit, submit that uniform national maritime standards are necessary for safe and efficient vessel operations for the international maritime community, a public policy well entrenched in federal statutes and regulations.

IV. CONCLUSION

The Pacific Merchant Shipping Association respectfully urges the Court to grant the petitions for a writ of certiorari to establish a national, uniform rule of maritime law that is consistent with the precedents established by this Court.

Respectfully submitted,

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